IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1962

No. 84

EDWIN M. FAY, as Warden of Greenhaven Prison, State of New York, and THE PEOPLE OF THE STATE OF NEW YORK,

Petitioners,

—against—

CHARLES NOIA,

Respondent.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR THE RESPONDENT CHARLES NOIA

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Opinion Below

The decision of the United States District Court for the Southern District of New York dismissing the writ of habeas corpus is reported at 183 F. Supp. 252. The opinion of the Court of Appeals for the Second Circuit, reversing the District Court, is at 300 F. 2d 345.

The Court below denied without opinion a request for reconsideration *in banc*; Chief Judge Lumbard, Judges Moore and Hays voting for reconsideration and Judges Clark, Waterman, Friendly, Smith, Kaufman and Marshall against.

Jurisdiction

The jurisdiction of this Court has been invoked by Petitioners under 28 U. S. C. §2101(d). Jurisdiction over the Petition of Warden Fay lies under 28 U. S. C. §1254(1).

A writ of certiorari was issued by this Court on May 14, 1962 (369 U. S. 869).

Questions Presented

I

May a federal court entertain and determine the merits of a state prisoner's application for habeas corpus relief where the prisoner failed to pursue a formerly available state remedy and there is now no state remedy available?

II

Should the Court reconsider and limit the scope of its decision in *Brown* v. *Allen*?

Applicable Constitutional and Statutory Provisions

(1) Constitution of the United States Amendment XIV

* * *

> No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.
>
> * * *
>
> The Congress shall have the power to enforce, by appropriate legislation, the provisions of this article.

(2) *Title 28 United States Code Section 2241.*

(a) Writs of habeas corpus may be granted by the Supreme Court, any justice thereof, the district courts and any circuit judge within their respective jurisdictions. . . .

• • •

(c) The writ of habeas corpus shall not exend to a prisoner unless—

• • •

(3) He is in custody in violation of the Constitution or laws or treaties of the Unite' States;

• • •

(3) *Title 28 United States Code Section 2243.*

A court, justice or judge entertaining an application for a writ of habeas corpus shall forthwith award the writ or issue an order directing the respondent to show cause why the writ should not be granted, unless it appears from the application that the applicant or person detained is not entitled thereto.

• • •

The Court shall summarily hear and determine the facts and dispose of the matter as law and justice require.

(4) *New York Code of Criminal Procedure, §543.*

1. Upon hearing the appeal the appellate court may, in cases where an erroneous judgment has been entered upon a lawful verdict, or finding of fact, correct the judgment to conform to the verdict, or finding; in all other cases they must either reverse or affirm the judgment or order appealed from or reduce the sentence imposed to a sentence not lighter than the minimum penalty provided by law for the offense of which the

defendant or defendants have been convicted and in cases of reversal, may, if necessary or proper, order a new trial.

• • • •

ARGUMENT

POINT I

A Federal Court may entertain a state prisoner's application for habeas corpus relief from a void judgment even though the prisoner failed to pursue a formerly available state remedy and there is now no state remedy available.

Recent controversy concerning the meaning, effect and correctness of the decisions of this Court in *Brown* v. *Allen*, 344 U. S. 443 (1953) and *Irvin* v. *Dowd*, 359 U. S. 394 (1959) point up the problems involved in this case.*

There appear to be three possible theories from which it may be argued that a federal court lacks the power to grant Charles Noia relief: (A) Exhaustion of State Remedies; (B) Waiver of Forfeiture; and (C) Adequate State Grounds. Each of these theories is separate from the others, flows from a different source and contain differing qualifications to the rules governing their general applicability.

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* See generally Professor Hart's criticism of *Irvin* v. *Dowd*, in *The Supreme Court, 1958 Term: Foreward: The Time Chart of the Justices*, 73 Harv. L. Rev. 84 (1959) and Judge Thurman Arnold's reply, *Professor Hart's Theology*, 73 Harv. L. Rev. 1298 (1960); Professor Reitz's *Federal Habeas Corpus: Impact of an Abortive State Proceeding*, 74 Harv. L. Rev. 1315 (1961); and *Federal Habeas Corpus: Postconviction Remedy for State Prisoners*, 108 Univ. of Pa. L. Rev. 461 (1960); and Mr. Justice Brennan's, *Federal Habeas Corpus and State Prisoners: An Exercise in Federalism*, 7 Utah L. Rev. 423 (1962).

In the discussion below, limited to the power of a federal court, Relator claims that the statutory requirement of exhaustion of state remedies has been or should be deemed to have been complied with; that the judicial rule of waiver is inapplicable to this case; and that the presumably constitutional rule of adequate state grounds has no application to habeas corpus cases.

A. *Exhaustion of "available" state remedies refers to presently available remedies*

The initial federal habeas corpus act empowering the district court to award the writ in favor of state prisoners restrained of their liberty in violation of the Constitution and laws of the United States contained no provision relating to a requirement of exhaustion of state remedies (14 Stat. 385). During the period between 1867 to the passage of the present statute in 1948, there developed the judicially created doctrine of abstinence now codified in Section 2254 of Title 28 U. S. Code.

The first significant case involving the doctrine arose in Georgia out of the state prosecution on an indictment charging perjury before a Federal Grand Jury. *Ex parte Bridges*, 2 Woods 428, 4 Fed. Cas. 99, No. 1,862 (E. D. Ga. 1875). After conviction, but prior to a state appeal, the defendant sued out a writ of habeas corpus in the United States District Court for the Eastern District of Georgia claiming that the state court lacked jurisdiction over the offense. The Court sustained the writ although noting:

> "The question for consideration . . . might have been determined elsewhere, and probably before now, had a different course been pursued in the state court; had the petitioner, Bridges, on his arraignment there, demurred for want of jurisdiction appearing on the face of the record; or shown these facts in evidence

> on a plea of not guilty; or on a return of the verdict moved in arrest of judgment; and, if in any of these instances . . . the decision was adverse to him he could have carried the case to the State Supreme Court and if that Court affirmed the judgment of the lower tribunal still he had the privilege to sue out a writ of error from the Supreme Court of the United States and have the question re-examined there" (4 Fed. Cas. at p. 100).

On appeal to the Circuit Court, the decision of the District Court was affirmed in an opinion by Circuit Justice Bradley who indicated that it might be "a wise amendment to the law" to hold a defendant to his writ of error before intervention (4 Fed. Cas. 104, 106).

The next step in the formulation of the exhaustion rule came in *Ex parte Royall*, 117 U. S. 241 (1886). There the petitioner was held by Virginia authorities pending trial on an indictment charging violation of allegedly unconstitutional state statutes. The writ had been denied by the United States Circuit Court and upon writ of error from the Supreme Court the Court found that although the federal courts had the *power* to issue the writ, it had discretion to refrain from the exercise thereof in advance of trial in the state courts. The Court said further that even after trial and conviction the defendant could still be held to his writ of error in the state courts, although this too was again a matter of discretion, citing *Ex parte Bridges*, *supra*. At the same term a motion for permission to file an original petition for habeas corpus was denied to a defendant who had been convicted in Michigan but who still had his writ of error available in the state system. *Ex parte Fonda*, 117 U. S. 516 (1886).

Thereafter the discretionary nature of the refusal to intervene was repeatedly emphasized in cases involving applications made prior to trial: *Cook* v. *Hart*, 146 U. S. 183 (1892); *New York* v. *Eno*, 155 U. S. 89 (1894); and in cases after trial but prior to suing out a writ of error: *In re Duncan*, 139 U. S. 449 (1891); *In re Wood*, 140 U. S. 278 (1891) and *In re Frederich*, 149 U. S. 70 (1893).

The problems arising under the rule of exhaustion and abstinence appear intermittently in the pages of the United States reports over the next forty years. Three cases, *Tinsley* v. *Anderson*, 171 U. S. 101 (1898). *Urquhart* v. *Brown*, 205 U. S. 179 (1907), and *Mooney* v. *Holohan*, 294 U. S. 103 (1935) warrant particular consideration notably because they were relied upon in *Ex parte Hawk*, *infra*, the case upon which the present statute is based.

In the *Tinsley* case a circuit court dismissal of a habeas corpus petition was affirmed on the ground that an appeal was still pending within the state system. Oddly enough the appeal through the state system and thence to this Court via writ of error arrived simultaneously with the appeal from the circuit court's refusal to grant the writ. Relying upon *Ex parte Royall*, *supra*, the Court affirmed the habeas denial and then proceeded to the merits of the claim on the writ of error to the state court.

Urquhart v. *Brown*, *supra*, reversed a circuit court order sustaining the writ on the ground that relator had failed to completely exhaust his "state" remedies by taking out his writ of error from the United States Supreme Court to the Supreme Court of Washington. That such a remedy was then still available was emphasized by the Court's reversal.

> "With liberty to apply for a writ of error to review the above judgment of the Supreme Court of Washington" 205 U. S. at p. 183.

Mooney v. *Holohan, supra*, was an original application to the Supreme Court on the grounds of perjured testimony knowingly used by the prosecutor. Several abortive attempts to raise this question in the California state court had been denied because the remedies pursued were inappropriate. When the case was presented to this Court, it was found that a state habeas corpus procedure, not resorted to by the petitioner, was probably still available in California. In denying the original petition, without prejudice, it was held:

> "... before this Court is asked to issue a writ of habeas corpus, in the case of a person held under a state commitment, recourse should be had to whatever judicial remedy afforded by the State *may still remain open*." (Emphasis supplied) 294 U. S. at 115.

Such was the state of the rule of exhaustion in 1944 when Henry Hawk moved for leave to petition for a writ of habeas corpus. *Ex parte Hawk*, 321 U. S. 114. Hawk had been tried and convicted in Nebraska on a charge of Murder and was serving a life sentence. He claimed that he had been forced to trial with assigned counsel and had been denied a twenty-four hour continuance to obtain retained counsel. He did not appeal the conviction—a failure which was characterized in a subsequent proceeding as being "without excuse." *Hawk* v. *Olson*, 326 U. S. 271, 273-4 n. 2 (1945).

The Court in *Ex parte Hawk*, substantially relying on the cases discussed above, denied the motion on the ground that there still existed untried post conviction collateral remedies within the state system whereby the constitutional claim could be raised.

It was with this background that the present statute was enacted in 1948. The Reviser's Notes to 28 U. S. C. A. §2254

indicate that the present statutory requirement of exhaustion was merely intended to be declaratory of existing law—viz., *Ex parte Hawk*. This purpose was reiterated by the majority of the Court in *Darr* v. *Burford*, 339 U. S. 200, 211, and notes 31-33 (1950).

In not one of these cases which form the basis for the present statute was it held that antecedent failure to pursue a no longer available remedy bars federal habeas corpus under the doctrine of exhaustion of available state remedies. Clearly, in each instance, the Court's expressed recognition of the present availability of other remedies, together with the present tense language of Section 2254, negatives such an assertion.

Analysis of the plain language of Section 2254 reveals three alternative procedural prerequisites to the issuance of the writ:

1. The prisoner must exhaust his remedies available in the courts of the state; or,

2. There is an absence of available state corrective state process; or

3. "Circumstances" render the state process ineffective to protect the rights of the prisoner.

The second paragraph of the Section would appear to merge the first two alternatives by deeming the prisoner to have complied with the exhaustion requirement by a showing that there is an absence of available corrective process.

Whether or not relator may proceed under the first disjunctive requirement or under the second is immaterial. Compliance with either is compliance with the Section. The second paragraph reads:

> An applicant shall not be deemed to have exhausted the remedies available in the courts of the State, within the meaning of this section, if he *has* the right under the law of the State to raise, by any available procedure, the question presented. June 25, 1948, c. 646, 62 Stat. 967. (Emphasis supplied.)

To interpolate the word "formerly" preceding the word "available" each time it appears in the Section is to completely distort the clear present tense caste of the statute. Not only is such interpolation contrary to the language and judicial history of the Section but it creates the anomalous and artificial situation so accurately described by District Judge Cashin:

> "If a state is zealous in assuring that unconstitutional convictions are not obtained and to this end allows a post conviction remedy other than appeal, the federal court has jurisdiction to review the state court conviction no matter when this post-conviction remedy is availed of. On the other hand, if a state is far less zealous in the interests of justice and refuses any post conviction remedy on grounds which could have been raised by appeal, the federal courts are precluded from any review if an appeal be not taken. However, this is the only conclusion I can reach on a review of the decided cases" (183 F. Supp. at 227; R. 66).

Indeed had Charles Noia been convicted just across the Hudson River he would be granted relief in the state and/or federal court. See, *State* v. *Rosania*, 33 N. J. 267, 163 A. 2d 139 (1960). Rosania had been convicted of murder with a jury recommendation of life imprisonment. He did not appeal. His two co-defendants were sentenced to death and appealed through the State system and eventually obtained habeas corpus from the Third Circuit. *U. S. ex*

rel. De Vita v. *McCorkle*, 248 F. 2d 1, *cert. denied*, 355 U. S. 873 (1957).

Rosania, seeking the benefits of the *De Vita* decision sought habeas corpus in the New Jersey County Court. The writ was sustained in the trial court but reversed by the State Supreme Court. *State* v. *Rosania, supra.*

The Jersey court, "pass[ing] over all adjective questions so that it may be certain meritorious consideration is afforded to the question involved", found that the Third Circuit's basis for upsetting the co-defendant's conviction* was inapplicable to Rosania. The Court stated that if Rosania had the same meritorious claim as his co-defendants ". . . the County Court's action should be sustained; otherwise, not."

The Warden of Greenhaven Prison claims that the release of Charles Noia will destroy the delicate balance between state and federal courts. The basis of this "delicate balance" is founded upon the doctrine of comity, best expressed in the excerpt from *Darr* v. *Burford* quoted at page 22 of the Petitioner's Brief. The doctrine of comity enunciated by that case is one of comity between courts:

> ". . . one court should defer action on causes properly within its jurisdiction until the courts of another sovereignty with concurrent powers, and already cognizant of the litigation have had an opportunity to pass upon the matter" (339 U. S. 200, at 204 and n. 10).

This can only refer to abstinence by the federal courts while the state courts are still cognizant of the litigation or capable of entertaining collateral proceedings wherein the federal questions could be litigated.

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* One of the jurors was allegedly prejudiced on the question of imposition of capital punishment.

This was the view taken by the late Justice Holmes, dissenting in *Frank* v. *Mangum*, 237 U. S. 309 (1915). He stated that the doctrine is a,

> ". . . principal of comity and convenience (for in our opinion it is nothing more,) that calls for a resort to the local appellate tribunal before coming to the courts of the United States for a writ of habeas corpus" (237 U. S. at 348).

This principle is most recently reflected in two cases before the Second Circuit.* In both cases the Court found that Relator had an avenue of relief presently open to him within the state appellate system and in both cases the Court stated it would be "unseemly" for the district court to entertain the writ before the *available* higher state court remedies (including review by this Court) had been availed of.

Because of expanding and retroactive concepts of due process and equal protection, the courts of the nation led by the federal courts have widened the scope of post conviction collateral remedies. There can be no doubt that the initial responsibility to enforce the criminal law must lie with the states. But to harness a federal right to vindicate a federal wrong on the fortuitous factor of whether or not a state provides an added remedy is to partially immunize those states which evidence least concern for those rights. Regardless of motive, certainly no state is anxious to defend its criminal process in the federal courts and to so restrict access to the federal courts will obviously encourage technical limitations on the state's post conviction procedures.

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* *U.S. ex rel. Kling* v. *LaVallee*, 306 F. 2d 216 (1962) and *U.S. ex rel. Williams* v. *LaVallee*, 276 F. 2d 645, *cert. denied* 364 U.S. 922 (1960).

This is not to say that exhaustion of available state remedies play an insignificant role in federal habeas corpus procedure. Considerations of comity and orderly judicial administration preclude a state prisoner from a federal writ where there is still an opportunity to obtain redress within the state system primarily charged with the enforcement of the criminal law.

Nor may a defendant with complete impunity elect to by-pass the state appellate process in the hope of finding a more sympathetic forum in the federal courts. Doing so results in a forfeiture of all claims to reversible error of a non-federal nature* and also a waiver of all but the most elementary federal claims. The confusion which exists in this "untidy area of the law" lies not in the exhaustion rule, but the application of the doctrine of waiver which, if its exists, exists independently of the requirement of exhaustion of state remedies.

B. *Relator has not waived his right to be relieved of the penalties imposed under the judgment*

Two vital distinctions exist between the claim of Charles Noia and the claims of the Daniels' defendants in *Brown* v. *Allen*, 344 U. S. 443 (1953). The first is the nature of the claims and the other goes to the method of its proof.

The Daniels' claimed that they had been denied equal protection because members of their race had been excluded from the grand and petit jury.** There is a substantial distinction between a trial of a Negro with members

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* See, eg. *People* v. *Rizzo*, 246 N.Y. 334 (1927).

** A claim of coerced confession was also made but found completely unproven by the District Court. The dissenting justices in this Court and the dissenting judge in the Court of Appeals referred only to the jury exclusion question as having been proven.

of his race excluded from the panel and a trial where the only evidence is a coerced confession.

In the former situation it is possible for the jury to weigh the evidence and impartially decide the case. The right protected is a procedural one for if the array had included a representative number of Negroes but through chance or challenge the Daniels' wound up with the same all white jury there would be no denial of due process or equal protection.

On the other hand an involuntary confession is, in effect, irrebutably presumed to be false. III Wigmore, *Evidence*, §822 (3rd Ed. 1940); *Stein* v. *New York*, 346 U. S. 156, 192 (1953). The Noia jury thus had before it fraudulent evidence which led them to their verdict. This then is:

> "... one of those extraordinary cases in which a substantial claim goes to the very foundation of a proceeding ..." (Frankfurter, *J.*, concurring opinion, *Brown* v. *Allen*, 344 U. S. at 503)

and to which the waiver doctrine does not apply

The second distinction, the method of proof of the claim, is one which goes to the heart of this litigation. The Daniels defendants came to the District Court with mere allegations of denial of due process and equal protection. Even *after a hearing* the claims were found without substance. It is apparent that their claims could not stand solely on the state trial record and at best could be made out only with the hearing. What the Daniels defendant waived by failure to timely appeal was not the right to attack imprisonment under a void judgment; rather they forfeited only the right to collaterally establish the invalidity or voidability of the judgment.

Here the involuntary nature of the confession and, it is claimed, consequent loss of jurisdiction by the trial court

appear affirmatively on the face of the record of the State proceeding and no extrinsic fact or evidence is relied upon.*

Unquestionably criminal jurisdiction to convict and imprison attached at common law where the trial court had jurisdiction over the defendant and over the subject matter and a showing of such jurisdiction upon the return of a writ of *habeas corpus ad subjiciendum* concluded a court from further enquiry. *Ex parte Watkins*, 3 Pet. 193 (1830); *Bushel's Case*, 6 Howell's State Trials 999 (1670). The very nature of the Writ demanded such a rule, for regardless of the "incorrectness" of a judgment of conviction detention thereunder would be "lawful." Only if the judgment were void could the resulting detention be unlawful. See, 1 Bailey, *Habeas Corpus* 79-94 (1913 ed.), 9 Halsbury's *Laws of England* 701-715 (2d ed.).

The liberalization of the writ from its common law strictures was effected by the 1867 statute and its successor 28 U. S. C. §2241 *et seq.* The writ which may lie under this statute reaches any detention which is in violation of the laws and Constitution of the United States, and gives the District Court the power to find facts beyond or in contradiction of those found by the State Courts.**

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* It has been stipulated between counsel herein that:

> "For purposes of this proceeding, the District Attorney of Kings County concedes that the coercive nature of the confession elicited from the respondent and introduced in evidence against him at the trial in Kings County Court was established and, therefore, the record of trial need not be printed."

** See, e.g., *Cranor* v. *Gonzales*, 226 F. 2d 83 (9th Cir., 1955), cert. denied, 350 U.S. 935 (1956); *U.S. ex rel Rogers* v. *Richmond*, 252 F. 2d 807 (2d Cir., 1958); cert. denied 357 U.S. 220 (1958); same, 271 F. 2d 364 (2d Cir. 1959), reversed on other grounds, 365 U.S. 534 (1961) *U.S. ex rel Alcaro* v. *Murphy*, 277 F. 2d 304 (2d Cir. 1960).

The statutes thus created a new class of judgments which could not support a lawful detention. Not only were void judgments insufficient, but the court now had the power to enquire into voidable judgments. The Daniels waiver applied to the latter type judgment and only went to the right of the defendant to require the district court to make new factual determinations upon which would rest the assertion of coercion and invalidity. The Daniels waiver did not touch upon the situation where the facts were undisputed and where the relator relied exclusively on the State record as the proof of its own nullity.

That such a distinction is a meaningful one was acknowledged by a unanimous Court in *Bowen* v. *Johnston*, 306 U. S. 19 (1939). In that case the defendant had been convicted in the district court of murder within a national park. He did not appeal the conviction but four years later sought habeas corpus on the grounds that the State of Georgia had exclusive jurisdiction over the crime.

In a carefully worded opinion Chief Justice Hughes, after noting the general rule that habeas corpus will not supplant a writ of error to review an erroneous factual determination of the trial court's jurisdiction, proceeded to rule that where the absence of jurisdiction as a matter of law appears on the face of the record the remedy of habeas corpus may be needed to release the prisoner from punishment imposed by a court manifestly without jurisdiction and that such remedy is not barred by the initial failure to appeal.

Thus where on the face of the record there is a controverted issue regarding the basic jurisdictional facts relator can rightly be held to the ordinary appellate procedure provided by the State. A possible reason for such a rule is that the State's method of reviewing factual issues is as

much a part of determining the facts as is the initial finding of a trial court: Cf. *Frank* v. *Mangum*, *supra*, at 335.

Under *Brown* v. *Allen*, *supra*, at page 506 where the federal habeas corpus judge is directed to give "great weight" to a state court factual determination it is necessary that the defendant afford the state an opportunity to finalize its finding. In instances where factual determinations are subject to appellate review a trial court's finding may be reinforced or modified upon appeal thereby completing the state court adjudication of the fact. See N. Y. Code of Criminal Procedure, §543. No such consideration is involved where the jurisdictional question is a naked question of law (i.e. where the basic facts are undisputed and all that remains is to interpret them). In this instance the State has exhausted its power to enlarge or detract from the basic elements which will sustain or defeat its jurisdiction. Likewise the principle contended for has no application where the judgment is merely voidable for error of law not going to the trial court's jurisdiction. In such instances the judgment is conclusive until reversed and habeas corpus will not lie. *Sunal* v. *Large*, 332 U. S. 174 (1947), reversing Judge Learned Hand's determination in *U. S. ex rel. Kulick* v. *Kennedy*, 157 F. 2d 811 (2d Cir., 1947) that habeas corpus would lie for a non-jurisdictional error.

The power to enquire into jurisdiction is not solely limited to the initial jurisdiction of a court to hear a criminal case. Lack of jurisdiction is no less great when the court loses jurisdiction during the course of the proceeding and thus has no power to render judgment. *Johnson* v. *Zerbst*, 304 U. S. 458 (1938).

In his opinion, dissenting from the denial of a petition for reargument, Mr. Justice Frankfurter characterized

Johnson v. *Zerbst* as a "trail blazing decision" because it, in a fundamental way, restates the common law principles of habeas corpus and brings it into harmony with the statutory writ and modern concepts of fair dealing in criminal cases. *Burns* v. *Wilson*, 346 U. S. 844 (1953).

Historically the power of the court to pronounce judgment rested upon the court's initial authority to assume jurisdiction. The early state habeas corpus cases indicate the federal court's difficulty in reconciling this principle with the broad statutory writ and the expanding concepts of due process and equal protection of law.

Johnson v. *Zerbst*, although by no means without precedent, returned habeas corpus to its proper function but retained within its scope claims of federally protected rights denied during trial. It did this by holding that the denial of a fundamental right in the course of trial stripped the trial court of jurisdiction to proceed to judgment. Although *Johnson* v. *Zerbst* involved the denial to a federal defendant his rights under the Sixth Amendment, the holding is equally applicable to a claim of denial of rights under the Fourteenth Amendment in the course of a state prosecution as Circuit Judge Moore recently stated in *U. S. ex rel. Williams* v. *LaVallee*, *supra*:

> "The allegations here [of coerced confession used to obtain conviction] affect the fundamental jurisdiction of the court in the sense of the principles set forth in *Johnson* v. *Zerbst* . . ."

The notion that the denial of a fundamental right in the course of a state trial results in the loss of "particular" jurisdiction (Holmes, *J.*, dissenting in *Frank* v. *Mangum*, *supra*) is not only consistent with the history of the common law and statutory writ, but conceptually is required by the nature of the proceeding which can lie only if the

detention is unlawful. Cf. *Stein* v. *New York*, *supra*, at 192. Compare, Restatement, *Judgments*, §4, Comment a.

Inasmuch as it is claimed herein that the confession of relator was coerced as a matter of law, the resulting judgment is void and may not be interposed by the State as a defense to a civil action of habeas corpus.

In this context the distinction between *Daniels* v. *Allen*, *supra*, and Noia's case is crucial. The Daniels defendants were seeking the right to *establish* the facts to support their claim while Noia comes to the federal court with established and concealed facts which can lead only to the conclusion that his confession was involuntary.

The uniform rulings of the Supreme Court have held that absence of jurisdiction, established as a matter of law on the trial record, becomes a part of the judgment and renders it always subject to collateral attack: *In re Snow*, 120 U. S. 274 (1887); *Nielsen, Petitioner*, 131 U. S. 176 (1889).

In both cases the *defense* of former jeopardy had been established as a matter of law on the facts before the trial court. In both cases the trial judge erroneously decided the question. Neither defendant appealed but sought release by way of habeas corpus. In the *Nielsen* case the Solicitor General argued:

> "If the judgment of the Court . . . was wrong, it was an error, but the error was one of judgment. The judgment might be voidable for error, but was not void for want of power, and, until reversed was conclusive. The writ of habeas corpus should not be converted into a mere writ of error" (131 U. S. at 179).

In both cases the writ was sustained even though the constitutional violation did not go to the jurisdiction *strictí juris* of the trial court.

C. *The Doctrine of "Adequate and Independent State Grounds" has no applicability to habeas corpus proceedings*

The decision of this Court in *Murdock* v. *City of Memphis*, 87 U. S. (20 Wall.) 590 (1875) sets forth the doctrine of "adequate and independent state grounds" as a bar to federal review of state court decisions.

Prior to the dissenting opinions in *Irvin* v. *Dowd*, 359 U. S. 394, 407, 412 (1959) there appears to be no opinion by this Court which would extend the *Murdock* v. *Memphis* rule limiting direct appellate review to the independent habeas corpus proceeding.

Reduced to its most elementary terms *Murdock* holds that where a decision of the highest state court rests upon an independent and adequate non-federal ground this Court will not review the federal questions also in the case whether they were passed upon by the state court or not. The rationale for the doctrine is simply that no matter how this Court would decide the federal question the remittance of the case back to the state would not affect the ultimate disposition of the case for the state court would merely reiterate its local ground for decision.

In this litigation between Charles Noia and the Warden of Greenhaven Prison we do not ask the federal courts to review the correctness of Judge Fuld's decision which held coram nobis to be unavailable under New York law. Coming from New York's highest court, the decision is automatically correct as a statement of New York law. *Erie R.R.* v. *Tompkins*, 304 U. S. 64 (1938).

Relator seeks only to litigate the question of whether his detention by the Warden is, in the statutory language, "in violation of the Constitution or laws or treaties of the United States." The judgment upon which the detention is

based is void, *Brown* v. *Mississippi*, 297 U. S. 278, 286-287 (1936); *Blackburn* v. *Alabama*, 361 U. S. 199, 210-211 (1960) and the continued detention is a continuing violation of Charles Noia's rights under the Federal Constitution.

If *this* federal question is resolved in Relator's favor then he will be released, regardless of the correctness of *People* v. *Noia*, as a statement of New York law. See, *Mattox* v. *Sacks*, 369 U. S. 656 (1962).

Even if the kind of adequate state ground we are here concerned with is not precisely the same as the *Murdock* doctrine but rather merely something akin to it, it does not apply as an absolute bar. Every case in this Court from *Ex parte Royall*, *supra*, through *Frisbie* v. *Collins*, 342 U. S. 519 (1952) indicates that any federal court may issue the Writ even prior to state trial and/or appeal. Comity and orderly administration of justice demand that such power be exercised sparingly however if the federal court has the *power* to issue the writ prior even the state's opportunity to formulate a state ground, certainly it must follow that no state ground would be a bar.

Quite clearly Congress has not intended there to be a bar. Inasmuch as the 1867 statute was passed prior to *Murdock* obviously the doctrine of adequate state grounds played no part in the creation of the remedy. If anything the intention of Congress would have been exactly to the contrary for the original habeas corpus act was intended in large part to prevent the Southern States from thwarting post-Civil War legislation by judicial action. More settled conditions and judicial respect for the state court process tempered the blanket grant of power and gradually the doctrine of exhaustion of available state remedies evolved.

When Congress was called upon to codify and revise the law of habeas corpus in 1948 it did not choose to engraft

"adequate state grounds" into the statute. It passed only one limitation upon the power of the federal court "to hear and dispose of the matter as law and justice require," and that was the requirement of exhaustion of available remedies.

In the face of the near hundred years existence of the modern Great Writ without such limitation and the failure of Congress to include such a limitation in the general revision of 1948, the wisdom of now adding one more procedural hurdle to prevent consideration of a valid claim is open to serious question.

POINT II

Brown (Daniels) v. Allen, to the extent that it imports a forfeiture of basic constitutional claims, should be overruled.

If the decision of this Court in *Daniels* v. *Allen* is found to be as inflexible as urged by Petitioner herein, it is respectfully suggested that the Court reconsider the wisdom and serviceability of a rule which can have meaningful effect only when applied as an absolute bar to legitimate constitutional claims.

Meritless claims, insofar as their ultimate disposition is concerned, are unaffected by any rule which prevents consideration because of procedural default or inadvertance. It is only in the area of those fortunately few cases of grievous and fundamental deprivation of constitutional right that, as contended by Petitioner, a prisoner's procedural lapse should stand as a bar to the consideration of substantive claims. The Great Writ, standing as a remedy for those rare instances of fundamental error is thus to be restricted still further to even fewer cases contemplated

by the statute's direction to dispose of the matter as law and justice require.

Compelling reasons demand federal relief to be available. Aside from the benefit to the particular relators involved, the habeas corpus act seeks to impose upon the states uniform minimal standards of justice under the Fourteenth Amendment. The concept which would deny relief to Noia because New York will not now consider his claim but grant federal belief if they would, is one which penalizes those states which, in the interests of justice, provide expanded remedies to raise claims under the Federal Constitution. As noted by the District Court below this concept immunizes from review the decision of those states whose judges walk the narrow path of state procedural grounds.

Thus the reach of the federal Writ to inquire into substantive injustice is to be limited by state procedural rules which perpetuate the initial violation of federal right.

In *U. S. ex rel. Kulick* v. *Kennedy, supra*, the late Judge Learned Hand held out habeas corpus to be available to correct manifest injustice when all else had failed. In reversing *(sub nom. Sunal* v. *Large, supra)* this Court specifically noted the error involved did not go to a basic constitutional right and left open the writ's availability in such cases.

Unquestionably failure to take advantage of a remedy once provided by the state is a factor to be considered before the issuance of the federal writ. But it should only be dispositive of the application where reason and justice demand such a result. This Court's decision in *Ex parte Spencer*, 228 U. S. 652 (1913) is an outstanding example of a situation where a state prisoner's volitional failure to appeal should prevent a federal court from entertaining a writ. Spencer was convicted of crime in Pennsylvania

and was sentenced under a statute which imposed imprisonment for a minimum of eighteen months and a maximum of two years. At the time the crime was committed the statute provided for imprisonment of not exceeding two years with a mandatory minimum sentence of only six months. Instead of appealing, Spencer immediately sued out a writ in federal court claiming his right to immediate release on the ground that the application of the statute was *ex post facto* and therefore unconstitutional.

In affirming the denial of the writ this Court held that in by-passing the state appellate system the defendant had prevented the state court from interpreting the amendment as a parole statute, an interpretation which if made in good faith would be binding on the federal courts and would save the statute from the claim of unconstitutionality; further the Pennsylvania appellate court, if holding the applicability *ex post facto* had the power to modify the judgment so as to impose the original six month mandatory minimum sentence upon the defendant whereas the federal court only had the power to order the prisoner's release.

Therefore by his deliberate act of not appealing, Spencer sought to prevent the State of Pennsylvania from rendering a decision which would have validated the judgment and overcome any objection to the conviction.

If the State of New York could have properly done anything other than reverse Charles Noia's conviction because of the coerced confession and the absence of any lawful evidence Petitioners could properly assert the position of the State had been prejudiced by the failure to appeal.

The position of the Petitioner in this case however is that Noia *had* to appeal in order that New York might first vacate the conviction or improperly affirm the judgment. Because he did not give New York the opportunity to be wrong, as it was with co-defendants Caminito and Bonino,

or because he did not give it the opportunity to be right, which would have saved him eighteen years in prison, he must serve the remaining years of his life in jail.*

Certainly the State of New York with immediate responsibility for the administration of the criminal law may lay down reasonable rules governing the procedure in its courts. With equal certainty federal courts should defer to those rules—but the deference is one that should flow from respect and confidence that the state will see that fundamental justice is done. When it is apparent that justice—in the form of observance of constitutional guarantees—has not been done the federal court should exercise its ultimate responsibility of enforcing the Constitution. See, *U. S. ex rel. Goldsby* v. *Harpole*, 263 F. 2d 71 (5th Cir., 1959); *Bailey* v. *Hoosier*, 287 F. 2d 936 (8th Cir.) *cert. denied*, 368 U. S. 877 (1961); *Petition of Carmen*, 165 F. Supp. 942 (N. D. Cal.) aff'd 270 F. 2d 869 (9th Cir.) *cert. denied*, 361 U. S. 934 (1960).

The simple ultimate question on this appeal is whether Charles Noia must spend the rest of his life in jail on a conviction which all men now acknowledge was fundamentally wrong. If Noia was "wrong" in not appealing it is a strange brand of justice which equates this error in judgment with the initial deliberate wrong done by the State of New York. The eighteen years in prison have amply reimbursed the Sovereignty of the State of New York for any procedural lapse and New York's demand for further payment should be rejected.

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* Under a recent statute he will be eligible for parole after having served thirty years in prison. Executive clemency is apparently unavailable because of the outstanding indictments against the co-defendants who apparently are not disposed to change the *status quo* by moving for a speedy trial and or dismissal of the indictment.

Below the Court of Appeals held this case, with its peculiar and compelling fact situation, to fall within recognized exceptions to the general rules it found applicable. The Petitioner claims that the judgment exercised by the majority was improper; based solely on compassion and justice and ignoring the legal principles involved. What the Petitioner overlooks is that the principles involved are judge-made law and like all such law is designed to ultimately serve the ends of justice. That there should be exceptions to the general rules is consistent with our common law tradition and with the Fourteenth Amendment power and the statutory grant to all United States judges and justices to issue the writ and dispose of the matter as law and justice require.

Conclusion

The order of the Court of Appeals for the Second Circuit should be affirmed and the writ of habeas corpus sustained.

New York, New York
November, 1962

Respectfully submitted,

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